DR. AMIR FARID DATUK ISAHAK

v.

DR. ABDUL RAHMAN ABU BAKAR & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-22-1164-89]
30 OCTOBER 1989

CIVIL PROCEDURE: *Application to set aside injunction granted to plaintiff - Partnership business - Dispute - Filing of writ by plaintiff - Application for dissolution of partnership - Application for perpetual injunction - Interim injunction granted - Principles applicable - Application by defendant to set aside injunction - Allegation of material non-disclosure.*

There existed a partnership business of medical practitioners under the name and style of "Zarina, Amir, Rahman and Rakan-rakan". The terms of the partnership are contained in the partnership agreement entered into between the three partners sometime in August 1988. A dispute arose among the partners and on 1 June 1989, the plaintiff filed a writ against the two defendants and sought several declarations from the Court, one of which was for an order of perpetual injunction restraining the first defendant from holding himself out or acting as a member of the partnership and the other for an order of perpetual injunction restraining the first defendant from participating in the affairs of the partnerships.

Now, the 1st and 2nd defendants apply for an order that the interim injunction granted on 24 August 1989 be set aside and that damages payable to the defendants be assessed and paid by the plaintiff and further that the costs of the application be borne by the plaintiff.

The defendants main contention was that the plaintiff was guilty of non-disclosure of a very important letter during their application for the injunction.

Held:

[1] In this case there was no serious question to be tried since there is no cause of action disclosed against the second defendant. On this ground alone the injunction granted against the second defendant should be set aside.

[2] There is a serious question to be tried in respect of the first defendant.

[3] The letter written by the plaintiff to all members of the staff was a very material evidence for the Court to consider at the *ex parte* application. The application for injunction would have been refused if the Judge had known the contents of the letter.

[4] The conduct of the plaintiff in writing the said letter amounted to a conspiracy against the first and second defendants. The conspiracy was to remove the first and second defendants irrespective of what the outcome of the Court proceeding in the present suit. It is clear that the plaintiff has deliberately misled the Court at the *ex parte* stage by not disclosing the letter and this is a clear abuse of the process of the Court.

[5] There has been a serious non-disclosure of material fact at the *ex parte* stage and therefore the first defendant is entitled to succeed in his application to set aside the injunction.

[Application allowed.]

Cases referred to:
United Engineers (M) Bhd. v. Lim Kit Siang [1988] 1 CLJ (Rep) 63
American Cynamid v. Ethicon [1975] 1 All ER 504
Tunas (Pte) v. Mayer Investment Pte. Ltd. & Ors. [1989] 2 MLJ 133

For the plaintiff - P.S. Ranjan; M/s. P.S. Ranjan & Co.
For the first defendant - M.S. Murthi; M/s. Murthi & Partners
For the second defendant - Mak Wai Chin; M/s. Rashid & Lee

JUDGMENT

Zakaria Yatim J:

This is an application by the first and second defendants for an order that (1) the interim injunction granted on 24 August 1989 be set aside; (2) damages payable to the defendants be assessed and paid by the plaintiff; and (3) costs of the application be borne by the plaintiff. The injunction was granted *ex parte* on the plaintiff's application on 22 August 1989.

According to the statement of claim the plaintiff and the defendants, on or about 1 May 1984, started to carry on a partnership business of medical practitioners under the name style of "Zarina, Amir, Rahman & Rakan-Rakan at No. 2A, Jalan I, Taman Sri Ukay, Ulu Klang, Selangor. The partnership has six premises in which it carries on its business. The terms of the partnership are contained in the Partnership agreement entered into between the three partners.

Sometime in August 1988 a dispute arose among the partners and on 1 June 1989 the plaintiff filed a writ against the two defendants. In the writ the plaintiff asks for (a) a declaration that the partnership between the plaintiff and the defendants constituted by the partnership agreement has been dissolved as from 13 July 1988, alternatively 6 March 1989 and (b) a declaration that the plaintiff and the second defendant are entitled to carry on the business of the said partnership as partners in the name of Zarina, Amir, Rahman dan Rakan-Rakan and (c) an order for a perpetual injunction restraining the first defendant from denying that the partnership has been dissolved; (d) an order for a perpetual injunction restraining the first defendant from holding himself out or acting as a member of the partnership; and (e) an order for a perpetual injunction restraining the first defendant from participating in the affairs of the partnership.

I have read the statement of claim and from the prayers stated above I find that the plaintiff, in the statement of claim is asking the Court to decide against the first defendant only.

I shall first deal with the second defendant. It has been submitted by Mr. Murthi, Counsel for the first defendant and Miss Mak, Counsel for the second defendant that the plaintiff has no cause of action against the second defendant. In support of their submissions they relied on para. 6 of the statement of claim which reads:

> By their letter of 8 September 1988, the plaintiff and the 2nd defendant also exercised their option to purchase the 1st defendant's share in the partnership inclusive of the 1st defendant's shares of the capital and assets of the partnership pursuant to cl. 17 of the agreement.

It is clear from his paragraph that the plaintiff averred that the partnership was in the hands of both the plaintiff and the second defendant and since the second defendant is still a partner, there is, therefore, no cause of action against the second defendant. There is nothing in the statement of claim stating facts alleging that the plaintiff's right either at law or by

statute has, some way or another been adversely affected or prejudiced by the act of the second defendant in the action. See *United Engineers (M) Bhd. v. Lim Kit Siang* [1988] 1 CLJ (Rep) 63. Therefore, since no cause of action has been disclosed against the second defendant, the plaintiff is not entitled to an injunction against the second defendant. It must be pleaded in the statement of claim that the plaintiff has a cause of action against the second defendant. It is immaterial whether the plaintiff has stated in his affidavits any cause of action against the second defendant. It is trite law that the Court has to consider the pleadings and one cannot add anything in the affidavit to supplement the pleadings. In *Roadstar-Anseah Investments Pte. Ltd. v. Thian Hock Electric Sdn. Bhd.* suit no. D2-22-282-87 [1990] 3 CLJ (Rep) 31, I said:

> At the hearing of the application, Mr. Nagarajah, Counsel for the defendant submitted that the plaintiff has not pleaded the elements of passing-off. According to him the plaintiff had not pleaded it was carrying on business in Malaysia and that its goods had gained reputation in Malaysia. He added that since the elements of passing-off has not been pleaded in the statement of claim, the plaintiff has not pleaded any cause of action on passing-off.

In that case I decided that since the plaintiff had failed to plead the essential element of passing-off in the statement of claim, the plaintiff had no cause of action on passing-off and therefore there is no serious question to be tried. It is my view that in this case there was no serious question to be tried since there is no cause of action disclosed against the second defendant. Following the decision in the *American Cynamid v. Ethicon* [1975] 1 All ER 504, the matter stops there. On this ground alone the injunction granted against the second defendant should be set aside.

I now turn to the first defendant. Mr. Murthi conceded that there was a serious question to be tried against the first defendant. He submitted that although there was a cause of action against the first defendant in the statement of claim that cause of action was different from that which was submitted to the Court when the plaintiff made the *ex parte* application. According to him the cause of action as contained in para. 6 of the statement of claim was whether the first defendant is still a member of the partnership whereas in the *ex parte* application, Counsel for the plaintiff submitted that the serious question to be tried was whether the first and second defendant by themselves entitled to dismiss the staff without the consent of the plaintiff. I think what was stated by the plaintiff during the *ex parte* application and what is stated in para. 6 of the statement of claim are quite inter-related. In any event I find that there is a serious question to be tried in respect of the first defendant.

Mr. Murthi submitted that although there was a serious question to be tried there was a serious non-disclosure of material fact at the *ex parte* stage. He referred to a letter written by the plaintiff to all members of the staff which is exhibited to the affidavit of the first defendant filed on 15 September 1989. He referred to the allegations made by the plaintiff in support of the *ex parte* application and submitted that the plaintiff failed to disclose the said letter. The letter was dated 18 July 1989 and the *ex parte* application was made on 24 August 1989. There is nowhere in the affidavit in support of the *ex parte* application any reference to the said letter. The said letter is reproduced below:

Private and Confidential

To : All Staff
From : Dr. Amir Farid Datuk Isahak.
Re : Invitation to join Dr. Amir

As you know, I am now engaged in a legal battle with Dr. Zarina/Dr. Rahman for the control of this clinic. As all attempts for an out-of-court settlement have failed, the Court case will proceed.

The case proper will probably take years to be settled. Before that the Judge will make a temporary order (injunction) whether Dr. Zarina and Dr. Rahman can act as partners pending the final judgment.

All the doctors, admin staff and maternity staff have already indicated that they will follow me whatever is the outcome. A survey conducted by the doctors also showed that nearly all clinic aides also have decided the same.

With this in mind, I feel that it is better to go ahead with our plans assuming the worst outcome (i.e. Dr. Zarina/Dr. Rahman declared as partners by the Court) so that whatever is the outcome we will still be able to function smoothly.

The Plan

1) A new company (Kotaraya Specialist Clinic Sdn. Bhd. - KSC) has been formed to run the clinic. Thus we still can use the Kotaraya name.

2) KSC will take over the tenancy of the clinics.

3) Dr. Zarina/Dr. Rahman will be given notice to vacate the premises. Thus they will be out whether they win or lose the Court case.

4) The date of switchover is 16 August 1989. KSC takes over Melawati on that date, and the other clinics will follow.

5) Staff will also have to be employed by the new company. I therefore take this opportunity to offer all staff to be employed by the new company. The terms will be the same as presently, and seniority will be carried over.

6) The salary scheme will be slightly revised to streamline and integrate the various staff categories. There will be some changes in the salaries as a result. If there are discrepancies between current and new salaries, the next Higher salary will apply. No staff will lose because of this revision.

eg.	Present salary	=	RM375
	New scheme	=	RM350/390
	Therefore, new salary	=	RM390

7) An acceptance/rejection form is enclosed for your action. As the matter is urgent, please reply by Saturday 22 July 1989. If no reply is received, it will be assumed that the offer is rejected.

8) You will be informed about when to submit your resignation etc. when the time comes. In the meantime, I will be happy to answer any queries you may have.

Thank you.

Sgd/-
(Dr. Amir Farid Datuk Isahak)

In my view the above letter was a very material evidence for the Court to consider at the *ex parte* application. I would have refused the injunction if I had known the contents of the said letter. See *Tunas (Pte) v. Mayer Investment Pte. Ltd. & Ors.* [1989] 2 MLJ at p. 133 at page 123. Mr. Murthi submitted that the plaintiff had misled the Court in suppressing a material fact. I think this is a serious matter.

In my view the conduct of the plaintiff in writing the said letter amounts to a conspiracy against the first and second defendants. The conspiracy was to remove the first and second defendants irrespective of what the outcome of the Court proceeding in the present suit. It is clear that the plaintiff has deliberately misled the Court at the *ex parte* stage by not disclosing the letter and this is a clear abuse of the process of the Court. Since there is a serious non-disclosure of material fact at the *ex parte* stage, in my view the first defendant is entitled to succeed in his application to set aside the injunction.

For the reasons stated above, I set aside the interim injunction granted *ex parte* against the first and second defendants on 24 August 1989 with costs to be taxed. I also order that damages be assessed by the Senior Assistant Registrar and paid by the plaintiff to the defendants.

Also found at [1990] 1 CLJ 484